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No. 06-766

In the Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, ET AL.,

Petitioners,

v.

MARGARITA LÓPEZ TORRES, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF JOHN DUNNE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF JOHN DUNNE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*[1]

For over four decades, *amicus curiae* John Dunne has been a champion of judicial reform and independence in New York State. He is a lifetime enrolled member of the Republican Party and served as a New York State Senator from 1966 to 1989, representing the Sixth District in Nassau County. From 1990 to 1993, Mr. Dunne served as Assistant U.S. Attorney General for Civil Rights, in the administration of the first President Bush.

As a legislator, Senator Dunne was actively engaged in a series of legislative innovations to improve the courts. From 1985 to 1986, and again in 1989, he served as Chair of the Senate Judiciary Committee, his tenure interrupted by a term as Deputy Majority Leader. One of his principal efforts was passage of the legislation that converted the New York State Court of Appeals into a "certiorari" type court. Mr. Dunne's advocacy on behalf of voting rights continued during his years in the Justice Department. In 1990, for example, he argued before an *en banc* Fifth Circuit that judicial elections are covered by Section 2 of the Voting Rights Act of 1965. This Court ultimately adopted the Government's position, unanimously. *Houston Lawyers' Ass'n* v. *Att'y Gen. of Tex.*, 501 U.S. 419 (1991).

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties, with the exception of Petitioner New York County Democratic Committee and Statutory Intervenor the Attorney General of New York, have filed letters with the Court consenting to all *amicus* briefs. Written consent from the remaining parties has been filed with the Court along with this brief.

Throughout his years in public service and since leaving office, Senator Dunne has been deeply committed to working with members of both political parties to reform and modernize the judicial election system in New York. He was appointed by both Governor Pataki and Governor Spitzer to their respective statewide Judicial Screening Committees, and he currently serves as chair of the screening committee for the Third Judicial Department. In 2003, he was appointed by New York State Chief Judge Judith Kaye to serve on the New York State Commission to Promote Public Confidence in Judicial Elections ("The Feerick Commission"). As a member of that Commission, he drafted the proposal to establish mandatory state-sponsored Independent Judicial Election Qualifications Commissions. He was also the founding chair of the New York State Bar Association's Special Committee on Judicial Independence, President of the Nassau County Bar Association, and a member of the House of Delegates of both the American and New York State Bar Associations.

New York's judicial election scheme has harmed Mr. Dunne, in his capacity as a voter and a member of the Republican Party, in the same manner that it has harmed voters throughout New York: It has consistently prevented him from having any meaningful role in selecting his own party's candidates for the office of Supreme Court Justice in his home district. Instead, under New York's election system, he must sit idly by while nominees are anointed by party leaders, who frequently choose candidates based not on their popularity or qualifications for office but on their personal connections and loyalty to those leaders.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners have submitted three extensive briefs to this Court, and an equal number have been submitted by *amici*

urging reversal. Not one of these submissions has even mentioned, let alone come to grips with, the *facts* of this case. Petitioners make much of what New York's judicial convention system is *supposed* to do, or was *designed* to do, but they spend precious little time examining what the system *actually* does.

The judicial convention system stands as an insurmountable barrier to qualified candidates who wish to appeal to their parties' rank-and-file members for a chance at nomination to Supreme Court justiceships. It entrenches party bosses at the expense of voters and candidates. In short, it deprives the vast majority of party members of their First Amendment rights to political association by preventing them from having any input into their party's choice of a standard bearer.

The First Amendment does protect the associational rights of political parties. But those rights belong to the *members* of political parties, like Mr. Dunne. They do not vest in party factions, whether denominated as "leadership" or anything else. When the state creates a system in which party "leaders" are privileged and the rank and file are deprived of any role whatsoever, the collective action that renders parties democratically valuable is lost. Worse still, here it is replaced by mere charade. As the courts below correctly concluded, the challenged system in this case deprives voters and ordinary party members throughout New York State of their First Amendment rights. That decision should be affirmed.

ARGUMENT

I. The Theoretical Convention System Described By Petitioners Does Not Exist.

Petitioners' arguments rely on a picture of New York's convention system that bears little resemblance to reality. Only by attempting to direct the Court's attention away from

the *facts* can petitioners possibly claim that the current system "enhanc[es] judicial independence and confidence in the judiciary." Br. of N.Y. County Dem. Comm. *et al.* ("County Br.") at 46. The system does no such thing, as petitioners are well aware.

In voting-rights cases such as this one, this Court has long adhered to the practice of making "pragmatic or functional assessment[s]" of the burdens on voters, instead of focusing on artificial, theoretical constructs. *Vieth* v. *Jubelirer*, 541 U.S. 267, 315 (2004) (Kennedy, J., concurring). Once this Court confronts the reality of New York's judicial election system, it will find that petitioners hide behind theory because the convention system in actual practice serves to keep voters, rank-and-file party members, and qualified candidates—in short, everyone except for entrenched party leaders—out of the judicial nomination process.

A. In The Voting Rights Context, Doctrine Should Not Be De-Coupled From Facts.

Petitioners and their *amici* insist that in assessing the constitutionality of New York's convention system, this Court should ignore the way that the system actually functions and should instead confine its analysis to a sanitized picture of the convention system that bears little resemblance to the real world. This approach is justified, petitioners claim, because in *theory*, New York's convention system is not *supposed* to function in a manner that places burdens on First Amendment freedoms. See, *e.g.*, *Amicus* Br. of Republican Nat'l Comm. ("RNC Br.") at 14 ("The state election rules have nothing to say about whether party leaders should recommend preferred candidates * * * ."). Any such burdens that come about in practice, petitioners argue, "are the result of purely private action." Br. of N.Y. State Bd. of Elections *et al.* ("BOE Br.") at 30.

There are two problems with this approach. The first is factual: As we will discuss in detail in the next section, New

York's system *is* designed to thwart the participation of voters in the selection of their party's candidates for office, and in that respect, it has succeeded handily. The second problem is doctrinal: For over sixty years, this Court has been clear that when analyzing election systems, it is necessary to investigate how those systems actually function in the *real world*, not just in theory.

This Court has been taking a "practical" approach to voting-rights cases for decades. In *United States* v. *Classic*, 313 U.S. 299 (1941), for example, this Court found that restricting voter access to Louisiana's primary was tantamount to restricting access to a general election because the primary represented "the only stage when such interference could have any practical effect on the ultimate result." *Id.* at 314. Twelve years later, in *Terry* v. *Adams*, 345 U.S. 461 (1953), this Court rejected as "formalistic" an attempt by a political "club," the "Jaybirds," to defend its racially-restrictive nominating activities against constitutional challenge by claiming it was simply a "private group." *Id.* at 466. Whether it was technically "private" or not, this Court noted, the Jaybird club's elections "ha[d] become an integral part, indeed the only effective part, of the elective process that determine[d] who shall rule and govern in the county." *Id.* at 469.

This focus on function over form continued to pervade this Court's voting-rights jurisprudence throughout the last century and into this one. In *Storer* v. *Brown*, 415 U.S. 724 (1974), for example, this Court emphasized the importance of focusing on "critical facts" in order "to assess realistically" the burden that an election law placed on candidates. *Id.* at 738. Similarly, it noted in *Bullock* v. *Carter*, 405 U.S. 134 (1972), that "[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." *Id.* at 143. More recent cases carry this tradition into the present day: As noted above, Justice Kennedy's concurrence in *Vieth* endorses "pragmatic or functional assessment[s]" of voter restrictions; in the cam-

paign finance context, this Court has insisted on examining "how the power of money *actually works* in the political structure." *FEC* v. *Colorado Repub. Fed. Campaign Comm'n*, 533 U.S. 431, 450 (2001) (emphasis added).

In this case, this Court should resist petitioners' entreaty to ignore "[t]he realities of the electoral process," *Lubin* v. *Panish*, 415 U.S. 709, 719 n.5 (1974), in favor of sterile theorizing about how the system *might* or *should* work. "Law reaches past formalism." *Lee* v. *Weisman*, 505 U.S. 577, 595 (1992). "[T]o disregard practical differences and concentrate on some abstract identities is lifeless logic." *Morey* v. *Doud*, 354 U.S. 457, 472 (1957) (Frankfurter, J., dissenting).

B. In The Current System, It Is Impossible For A Challenger-Candidate To Compete, Regardless Of Popular Support.

New York's judicial election laws, by design, enable a system that deprives voters and party members of any chance to vote for candidates who have not been pre-selected by unelected party "leaders." The "delegate convention" system assures that no candidate who challenges the party orthodoxy will ever find a place on the ballot, and likewise, that no reform-minded party member or faction can possibly succeed in circumventing the choices of the "leadership."

1. Successfully Running For Justice Is Impossible.

Because of the barriers erected by state law and the consequent stranglehold the party leaders in New York have over the nominating process, it is impossible for a candidate who lacks the support of party leaders to receive—or even effectively seek—his or her party's nomination. Indeed, as the district court found, no candidate backed by party leaders has *ever* been successfully challenged for a Supreme Court nomination. PA-130a-32a.[2] And because most judicial dis-

[2] "PA-___," which is appended to the Petition for Certiorari, refers to the opinions of the Second Circuit (PA 1a-92a) and district court

tricts in the state are dominated by one-party rule (and party-leader cross-endorsement is the norm in most others), the fact that it is impossible to receive the nomination means that it is impossible for a challenger candidate to be elected Justice.

It is no wonder that a challenger candidate has never succeeded in getting a spot on the ballot: As the district court and Court of Appeals found, and as decades of experience in New York bear out, such a task would be monstrously difficult. In order to secure a nomination, a candidate would need to convince more than half the "unaffiliated" delegates in his district to vote for him at the district convention. This could be accomplished, one supposes, in one of two ways: (1) by lobbying the party-sponsored delegates directly at the convention, or (2) by attempting to stock the convention with delegates loyal to the candidate by engineering a district-wide delegate election campaign.

Lobbying the supposedly "unaffiliated" delegates is an impossibility, as the district court record makes clear. Petitioners describe the nominating conventions as Madisonian deliberative bodies—a "form[] of representative democracy," County Br. at 20, designed to vest nomination decisions with delegates "who are familiar with the values of the party membership as a whole and who can educate themselves about the qualifications of the candidates and the duties of specialized offices." Br. of Att'y Gen. of the State of N.Y. as Statutory Intervenor ("AG Br.") at 26. This description is at best naïve and at worst disingenuous. Delegate "conventions" are empty pageants: They last 20 minutes, PA-129a, and do not *ever* produce a slate of nominees that differs in the slightest from that proposed by the same party bosses who select the delegates themselves.

Indeed, the record in this case demonstrates the impossibility of attempting to lobby party-sponsored delegates. As

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(PA 93a-185a). "JA-____," refers to the Joint Appendix filed in the Second Circuit and in this Court.

the Second Circuit opinion recounts in detail, Judge López Torres tried repeatedly, in successive years, to secure an interview with the delegate screening committee, to contact the delegates themselves prior to the convention, or to address the delegates from the floor of the convention. She was rebuffed at every turn by party leaders determined to prevent her from securing a nomination. PA-120a-21a, 139a-43a.

The district court and Second Circuit focused on the prospect of running a slate of delegates because, having been locked out of the convention, a challenger's only *conceivable* way to attain a nomination is to run her own delegates. And as those courts determined, the difficulty involved in running a slate of delegates is so great as to make it an impossible option for candidates with less than unlimited resources.

A comparison is helpful to illustrate the difficulty involved. Each time Mr. Dunne stood for election to the State Senate, he needed to collect 1,000 petition signatures from fellow Republicans in his district in order to have his name appear on his party's primary ballot. N.Y. ELEC. L. § 6-136(2)(h). Other important elective offices, both state and federal, have similar petition requirements under New York law: If a person wishes to be nominated for one of New York's seats in the U.S. House of Representatives, for example, he or she needs to collect 1,250 signatures from fellow party members. N.Y. ELEC. L. § 6-136(2)(g). To run for State Assembly, 500 signatures are necessary. N.Y. ELEC. L. § 6-136(2)(i).

By contrast, a challenger candidate for a Supreme Court justiceship would, as the courts below found, essentially have to run as many as 24 separate petition drives—one for each Assembly district that comprises his or her home judicial district. As the Respondents' brief to this Court explains in detail, this would require an absolutely Herculean effort. Resp't Br. at 5-10. Within each Assembly district, the candidate would need to recruit a slate of delegate candidates, as well as candidates for "alternate" slots. Each slate of candi-

dates would need to collect a minimum of 500 valid signatures from voters who had not already signed the petitions circulated by the party leadership. Even the *smallest* judicial district in New York contains at least *nine* separate assembly districts and has at least *64* convention delegates. PA-12a. A Supreme Court candidate in that district would thus need to collect *4,500* valid signatures, on nine separate petitions, after first recruiting 64 individuals willing to run in contested races for public office simply to win the privilege of casting a vote at a district-wide convention. A candidate for Supreme Court justice in the largest judicial district—which encompasses 24 Assembly districts—would need to collect *12,000* signatures and recruit *248* candidates for delegate and alternate slots.

Even accomplishing this Sisyphean task would not guarantee a candidate a spot on the ballot. To the contrary: After successfully engineering a massive petition drive, a Supreme Court hopeful would then need to conduct dozens, or even hundreds of separate voter-outreach campaigns, in order to convince party voters to elect the dozens or hundreds of officially "un-pledged" delegate candidates whose unfamiliar names would appear on primary ballots.

This is a significantly higher barrier to entry than that erected for nearly *every* elected office in the state. A candidate for Mayor of New York City must collect only 7,500 signatures in order to guarantee himself a spot on the primary ballot; even a candidate for *Governor* has an arguably easier time: He or she must collect 15,000 petition signatures, but once that task is accomplished, his or her name, like that of the mayoral hopeful, is on the ballot. Mayoral and gubernatorial candidates, along with their colleagues running for state and federal legislative positions, city council positions, and dozens of other elective offices, are spared the considerable burden of recruiting scores of "delegate" candidates, and then, if their petition drives are successful, conducting multi-

ple voter education campaigns in order to convince party members to vote for their chosen candidates.

Given the sheer complexity of this "byzantine" process, PA-12a, it is no wonder that no challenger candidate has ever succeeded in achieving the nomination.

Petitioners attack the Second Circuit's examination of a candidate's ability to run his own delegate slates by protesting that "New York's judicial nominating system was never *designed* to permit judicial candidates to campaign directly to primary voters." County Br. at 29 (emphasis added). Rather, "candidates are *supposed* to address their campaigning to unaffiliated delegates at the convention." *Id.* at 30 (emphasis added). That such an approach has never succeeded for a challenger candidate is irrelevant, petitioners argue, because, by considering such evidence, the Second Circuit relied on a "right to win standard." *Ibid.*

But the fact that a challenger candidate has never obtained her party's nomination is all the evidence that is necessary to show that the system—working, as the petitioners remind us, as it was "designed"—denies candidates lacking party leaders' imprimatur of approval any chance to participate meaningfully.

Petitioners are correct that one need not demonstrate *success* in the political process to show that a particular group has *access* to the political process. But in New York's nominating system, which is not based on popular votes but on the votes of supposedly "unaffiliated" delegates, evidence that the delegates *invariably* favor candidates sponsored by a particular faction shows that the system is a farce. Like many artificial barriers to entry, it serves to protect a structure that does not produce results that would stand up to any kind of true competition. The petitioners' standards for what

counts as a free election are so low that they could be met by sham elections in totalitarian countries.[3]

2. The Office Does Not "Seek The Man"; Candidates Seek The Office Through Back-Room Deals, Rather Than Electioneering.

In a system where challenger candidates *never* pose a credible threat, party leaders are free to treat the office of Supreme Court Justice as a commodity to be sold in exchange for favors, donations to political committees, and even personal bribes. The Feerick Commission found that "parties 'dole out' judgeships as political patronage and * * * candidates must cater to their local political parties to have a chance at an elected position." COMM'N TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS, FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 20 (February 6, 2006).

Petitioners argue that the current convention system is designed to ensure that "the office should seek the man, and

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[3] Indeed, Petitioners' defense of the delegate convention system as representing a sort of democratic ideal calls to mind the arguments advanced in favor of another voting system that lasted for 75 years before being discarded. In the Soviet Union, "[a]n individual [did] not have the right to propose himself as a candidate." VITALY LATOV, THE SOVIET ELECTORAL SYSTEM 50 (1974). Instead, this onerous duty was assumed by "[p]ublic organizations and associations of working people," *ibid.*, who were "well acquainted with the people they nominate[d]," *id.* at 51, and who invariably settled on only one candidate for each open position. The one-candidate procedure was fair, Soviet political theorists explained, because "the working people and their organizations ha[d] every possibility carefully to discuss all candidates and nominate the worthiest." B. BAYANOV ET AL., SOVIET SOCIALIST DEMOCRACY 91 (F. Kalinychev trans., 1968). This Court should take a skeptical view of any system, no matter how theoretically democratic and rhapsodically defended, that somehow simply never produces a single result contrary to the will of party officials.

not the man the office," BOE Br. at 11 (quoting N.Y. State Senate, *Report of the Special Committee of Senate on Primary Law Submitted with Bill to Establish State Wide Judicial Conventions*, S. Doc. No. 34, at 2 (1918)); County Br. at 2 (quoting same), and to "advance[New York's] significant interest in ensuring impartiality" and promoting public confidence in the judiciary. County Br. at 46. Such a system is no doubt desirable, but it is not the one that exists in New York today. Although the convention system avoids primary battles requiring fundraising efforts by candidates—which could reduce public confidence in the judiciary, as the Feerick Commission noted—it is simply not the case that it prevents candidates for Justice from engaging in unseemly campaigning. While would-be Justices need not *raise* funds in their quest to join the bench, money still plays a role in judicial campaigns; candidates frequently must donate to party officials' political action committees as a quid pro quo for the leaders' support. See Joel Siegel & Michael R. Blood, *Norman's the King of the Courthouse*, N.Y. DAILY NEWS, Mar. 24, 2002. And evidence suggests that in some cases, party officials may have literally sold Justiceships to candidates for tens of thousands of dollars. See Wayne Barrett, *The Sales of Justice*, VILLAGE VOICE, Jan. 13, 2007 (alleging that Brooklyn party leader sold Supreme Court Justiceship for $50,000 in cash and $6,000 in postage stamps).

Petitioners praise the current system for its preservation of judicial independence, See AG Br. at 26; County Br. at 44; but no Justice can be independent when she owes her job to a party leader who can threaten to withdraw the party's support in future elections. Indeed, the events that gave rise to this litigation belie petitioners' claims that judges maintain their independence in the current system. When she refused to hire cronies of the party officials who had helped her become a judge, Judge López Torres was denied the opportunity to become a Supreme Court Justice, despite her excellent qualifications and immense popularity in her district.

C. Running For Delegate Is Difficult And Pointless.

Finally, faced with the fact that it is functionally impossible for a candidate to actually run for Supreme Court Justice without the support of party "leadership," Petitioners fall back on the claim that a party member may run for *delegate* with little difficulty. With respect to the primary for delegates, Petitioners contend, "the barriers to ballot access * * * are quite low." AG Br. at 28. That claim is factually incorrect, but more important, it is irrelevant to the question before this Court: whether the political association rights of party members are hampered by the State's interference with their ability to participate in the selection of their party's candidate for *Supreme Court Justice*. Running for *delegate* is not an end in itself. It is an intermediate step toward the ultimate goal of nominating a candidate for *Justice*.

Of course, running for *delegate* is no easy matter either, given the manner in which the statutory scheme privileges the small factions that control the local party apparatus. Because the party itself can field delegate candidates as a pro forma matter, "independent" delegate candidates face a huge uphill battle. A delegate candidate must educate the voters as to why his or her candidacy is superior to others'. This persuasion is inevitably burdensome because unlike delegates in many convention systems, delegates in New York are not pledged to specific candidates. Voters would have to learn a great deal about a candidate to have any idea how the candidate might vote at the convention. Most voters do not even understand the role of a delegate, as Judge Keefe of Albany explained in his declaration to the district court. JA-501 ¶ 11.

Second, for party members who disagree with party leadership, running for delegate is a pointless exercise. Even if a "challenger delegate" were to succeed in earning himself a seat at the convention, the effort would be for naught. Unless a *majority* of delegates (or at least a substantial minority) were elected in this manner, and were therefore out

from under the thumb of local bosses, maverick delegates would have no chance of actually influencing the outcome of the convention. At best, challenger delegates earn the right to be puppets in what the courts and the media have rightly characterized as a "sham." Editorial, *A Turning Point For New York Courts*, N.Y. TIMES, Feb. 4, 2006, at A12; Editorial, *Don't Let Pols Choose Judges*, N.Y. NEWSDAY, Feb. 22, 2007, at A36. That is not meaningful political association. A would-be reformer who manages to overcome the hurdles involved in becoming a delegate will be a lone dissenting voice in a chorus of conformity at the convention. This is why the lower courts were correct to focus their examinations on the efforts required of candidates for *Justice* to field a *slate* of delegate candidates: Only a group of delegates, rather than a single one, can have any influence on the ultimate selection of a nominee.

II. The Current System Deprives Party Members Of Their Rights To Associate Politically.

Petitioners' *amicus* the RNC argues that the Second Circuit's ruling "encroached on the[] established rights of political parties," which the court should have balanced against the rights of candidates and voters. RNC Br. at 2. But the RNC creates a false dichotomy. New York's election law does not empower parties at the expense of voters or candidates. The law empowers party leaders at the expense of rank-and-file party *members* like Mr. Dunne.

A. The First Amendment Rights Of A Political Party Belong To Its Members, Not Its Self-Styled Leaders.

Petitioners and their *amici* envision a free-standing First Amendment right of association belonging to political parties. But this Court's cases establishing the rights of political parties show that the parties' rights derive from the rights of party *members*. This Court has always viewed political parties' freedom of association as synonymous with the free-

dom of association of party members. Indeed, as this Court wrote fifty years ago, "[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957). If that is so, then a party cannot claim that its freedom is being interfered with when the interest it asserts is *contrary* to the interest of its members.

In *Democratic Party* v. *Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981), this Court held that Wisconsin could not compel the Democratic Party to seat delegates at the national convention when Wisconsin state law provided for election of delegates in a manner contrary to party rules. In doing so, the Court emphasized the importance of the fact that "*the members of the National Party*, speaking through their rules, [had] chose[n] to define their associational rights by limiting those who could participate in the processes leading to the selection of delegates to their National Convention." *Id.* at 122 (emphasis added). New York's judicial election law does exactly what Wisconsin's delegate selection law did: It forces upon the party rank and file a system for selecting delegates to a nominating convention in a manner that prevents party *members* from making their own rules and expressing their own choices.

In its *amicus* brief supporting the petition for certiorari, the RNC alleged that "recognized associational rights of parties *qua* parties" include the ability of "party leaders [to] organize the rank-and-file, set goals, and endorse candidates." Cert. Pet. *Amicus Curiae* of Republican Nat'l Comm. at 17. But the two cases cited to support this proposition both concern the rights of party *members*, not their self-styled leaders. In *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208 (1986), the Court struck down a state law forbidding parties from letting independents vote in party primaries because the law "impermissibly burden[ed] the rights of [*party*] *members* to determine for themselves with whom they will associate." *Id.* at 214 (emphasis added). The RNC also cited *Eu*

v. *San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), in which the Court stated that "[i]t is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments." *Id.* at 224. But the freedom of association that the Court upheld in *Eu* was also that of the rank and file. The Court referred to the associational rights of "political parties *and their members*" numerous times throughout the opinion. *Id.* at 216, 219, 221, 222, 225 n.15, 229, 231, 232, 233. At no point did the Court suggest that the associational rights of political parties exist separately from the rights of their members such that they could trump the rights of the members. Indeed, as Respondents point out in their brief on the merits, Resp't Br. at 21, the *Eu* Court *rejected* California's contention that a party's "leadership" could "consent" to "infringements of *members' rights*," which are "independent" of those belonging to the parties themselves. 489 U.S. at 225 n.15 (emphasis added).

Petitioners also cite *California Democratic Party* v. *Jones*, 530 U.S. 567 (2000), for the proposition that political parties have freestanding associational rights independent of their members. County Br. at 38. This is a gross mischaracterization of *Jones*, which held California's "blanket primary" unconstitutional because it infringed on the rights of party *members* to choose with whom they wished to associate. 530 U.S. at 567. Relying on *Jones*, Petitioners assert that the Second Circuit's ruling "raises the real prospect of 'sadd[ling a party] with an unwanted, and possibly antithetical, nominee.'" County Br. at 39 (quoting *Jones*, 530 U.S. at 579) (alteration in original). But the danger in *Jones* was that a candidate who lacked the support of the party's *members* would be nominated. Petitioners turn *Jones*'s reasoning on its head by using it to argue that a nominee whom a party's members *support* would be "unwanted" by the party. *Jones* was a case about the rights of the rank and file to choose a candidate; indeed, the *Jones* Court explicitly noted that "the

ability of the party leadership to endorse a candidate does not assist the party rank and file, who may not themselves agree with the party leadership." *Jones*, 530 U.S. at 581. The problem with California's law was that it was designed to result in the party's nomination going to candidates who held ideological positions the parties did not accept. *Id.* at 587 (Kennedy, J., concurring). New York's law has the same problem: It *ensures* that nominees for Supreme Court Justice need not cater their positions to party members' preferences.

The only support that Petitioners can adduce for the proposition that political parties have freestanding rights entirely separable from those of their members are a handful of older cases from the courts of appeals. See Pet. Cert. 25-29 (citing *LaRouche* v. *Fowler*, 152 F.3d 974, 995 (D.C. Cir. 1998); *Bachur* v. *Democratic Nat'l Party*, 836 F.2d 837 (4th Cir. 1987); *Ripon Soc'y, Inc.* v. *Nat'l Republican Party*, 525 F.2d 567 (D.C. Cir. 1975) (en banc)). These cases are of limited value as authority for this proposition because they all represented challenges by individual voters to party rules, rather than challenges to a state law that, as here, *mandates* a certain procedure. Where a party and, presumably, many of its members have chosen to adopt a set of rules, the party's claim of associational freedom is much stronger than when a state law *requires* the party to adopt certain rules—particularly rules that *restrict* the rights of the vast majority of the party's members.

B. The Convention System Cuts Party Members Out Of The Nominating Process Altogether.

Instead of preserving the rights of party members, the convention system effectively shuts rank-and-file members out of the process of picking their party's nominee entirely. New York's election law, by statutory design, gives local party leaders a stranglehold over the judicial nomination process. Rank and file members like Mr. Dunne cannot influence it even if they try.

1. Party Members Have No Input Whatsoever Into Their Party's Nomination Process.

Petitioners claim that the convention system effectuates political parties' associational freedom, but the system actually operates to make sure that party members *cannot* choose with whom they associate. By design, the judicial nomination system shuts party members out of the nomination process entirely. The system provides no checks or balances by which the rank-and-file members can override the decisions of party bosses. As discussed above in detail, the system creates huge structural barriers to reform at every level: Challenger candidates cannot appeal to party voters directly in order to seek the nomination; potential reformers face huge obstacles in seeking even to become *delegates*; independent delegates cannot possibly influence the outcome of a convention; and rank-and-file members have no opportunity to influence the process at any stage.

The robust record developed in the district court amply demonstrates that the nomination system New York has imposed on voters serves to frustrate, rather than effectuate, the choices of the rank and file. Margarita López Torres tried repeatedly and aggressively to obtain her party's nomination for a seat on the Supreme Court bench. The legislative scheme at issue in this case enabled a tiny handful of party bosses to deny her the nomination without any input from party voters. Yet, when Judge López Torres stood for election to judgeship *not* controlled by party "leaders," the *members* of her party voted overwhelmingly for her, in record numbers. When a candidate with unprecedented popularity among actual voters is prevented by state law from even *asking* those voters to nominate her to an elective office for which she is undoubtedly qualified, it is the voters whose rights have been abridged. And as the Second Circuit noted, Judge López Torres's experience was not an "anamolous political mugging." PA-29a. The Feerick Commission, on which Mr. Dunne served, found that such problems exist not

just in Brooklyn, but throughout the state. The facts of this case are not aberrant; they are paradigmatic.

Indeed, Mr. Dunne's own experience is illustrative. Despite his record of dedication to the Republican Party and his demonstrated expertise in the area of judicial elections, he has never been put forward as a delegate candidate, even though he asked repeatedly for the opportunity. Instead, he has been passed over by local bosses in favor of slates of delegates who can be relied upon to rubber stamp the choices of the "leadership." These slating decisions are unreviewable. If a State Senator with 24 years' service to his party can be shut out of the nomination process entirely, there is little hope for rank-and-file party members who do not hold elected office.

Such a system is entirely contrary to the values behind the Supreme Court's cases upholding the associational freedom of political parties. *La Follette* refused to order the Democratic Party to seat Wisconsin delegates elected under state law that was contrary to party rules, because to do so would be a "substantial intrusion into the associational freedom *of members of the National Party.*" *La Follette*, 450 U.S. at 126 (emphasis added). The Court in *Jones* struck down California's blanket primary because it forced party members to associate with individuals they did not support. See *Jones*, 530 U.S. at 575-76. The *Jones* Court suggested that the choice of a party's *members* deserved more attention in a First Amendment analysis than the choice of the party's leaders. *Id.* at 581 (dismissing argument that blanket primary did not limit party's associational freedom because party leaders could still endorse candidates on ground that "the ability of the party leadership to endorse a candidate does not assist the party rank and file, who may not themselves agree with the party leadership."). In this case, where the facts make clear that the challenged state law actually prevents a candidate *favored* by huge swaths of party members from

even *seeking* nomination, First Amendment values are severely threatened.

2. The System Is Controlled By Entrenched Party Bosses.

The judicial election law and the convention system it creates guarantee that entrenched local party leaders have complete control over judicial nominations, and thus, over who becomes a Supreme Court Justice. And despite powerful opposition from all corners, the convention system has shown itself to be remarkably immobile. This is so because the very legislative structure that empowers local bosses creates disincentives for elected legislators to effect any sort of meaningful change, even if those legislators believe that change is in the best interests of voters.

The convention system is roundly criticized by elected and appointed leaders across New York's political spectrum. Even many of the most powerful members of the Republican and Democratic parties oppose the convention system. The words and actions of popularly elected representatives stand in opposition to the stated positions of the "leadership" of each political party in this Court.

For example, the Republican chairman of New York's Senate Judiciary Committee, John DeFrancisco, has strongly criticized the current system.[4] And, with the district court injunction in this case serving as a catalyst, the *entire* Republican caucus of the State Senate eventually supported Senator DeFrancisco's bill abolishing conventions. S. 55-A, 2005-

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[4] See Press Release, Senator Joseph L. Bruno, Senate Passes Legislation to Amend Supreme Court Candidate Selection Process (Feb. 13, 2006) ("[T]he current system * * * unfairly removes party voters from having a say in the process and it can potentially put Supreme Court nominations out of reach for several qualified candidates."), *available at* http://www.senatorbruno.com/press_archive_story.asp?id=12828 (last visited July 12, 2007).

2006 Reg. Sess., at 1 (N.Y. 2006). Mayor Michael Bloomberg, while still a member of the Republican Party, also voiced powerful opposition.[5] Democratic leaders opposed to the system include Governor Eliot Spitzer,[6] former New York City Mayor Edward Koch,[7] And Brooklyn District

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[5] Press Release, Mayor Michael R. Bloomberg, Mayor Michael R. Bloomberg Delivers Testimony Before the Commission to Promote Public Confidence in Judicial Elections (Sept. 16, 2003) ("[P]arty judicial conventions * * * are completely shrouded in secrecy with absolutely no input from the electorate."), *available at* http://www.ci.nyc.ny.us/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a0/index.jsp?pageID=mayor_press_release&catID=1194&doc_name=http://www.ci.nyc.ny.us/html/om/html/2003b/pr257-03.html&cc=unused1978&rc=1194&ndi=1 (last visited July 12, 2007).

[6] Tom Precious, *Spitzer Calls for Reform of Redistricting*, BUFFALO NEWS, November 22, 2005, at A7 ("Spitzer also said the state's system for electing judges -- which features judges getting on ballots after going through 'a system dominated by cronyism and backroom deals' -- should, at the very least, be replaced by a merit-type system involving independent screening panels that select candidates instead of local party leaders."); Linda Greenhouse, *Judge Selection To Be Reviewed By U.S. Justices*, N.Y. TIMES, February 20, 2007, at B1 ("Mr. Spitzer indicated that he did not support the existing system, which he said was "in dire need of reform." * * * [T]he governor-elect said that "there must be a way to primary onto the ballot," and added that "I will not support anything that has a closed convention structure, where only those who came out of the convention could be on the ballot.").

[7] Br. of Edward I. Koch as *Amicus Curiae* for Affirmance in Support of Appellees at 9-10, López Torres v. N.Y. State Bd. of Elections, 462 F.3d 161 (2d Cir. 2006) (No. 06-0635-CV) ("When local party and county leaders hand-pick judges, not only do the voters suffer, but so too does our compelling interest in maintaining the rule of law, as well as the constitutional and democratic values which it protects.").

Attorney Charles Hynes.[8] Important state judicial officers have also called for change, including Judith Kaye, Chief Judge of the New York Court of Appeals,[9] Jonathan Lippman, presiding Justice of the state appeals court in Manhattan and former Chief Administrative Judge of the New York court system,[10] and Judges Richard Bartlett, Joseph Bellacosa, and E. Leo Milonas, also former Chief Administrative Judges.[11]

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[8] Br. of *Amicus Curiae*, Charles J. Hynes, District Attorney, Kings County, New York, in Support of Plaintiffs-Appellees, Seeking Affirmance of the Order of the District Court at 2, López Torres v. N.Y. State Bd. of Elections, 462 F.3d 161 (2nd Cir. 2006) (No. 06-0635-CV) ("So long as the district convention system remains in place, the party leaders and not the voters of this State determine who fills each seat on the bench of the Supreme Court, and the rights of legitimately qualified candidates to the bench will be frustrated.").

[9] JUDITH S. KAYE, N.Y. STATE UNIFIED COURT SYSTEM, THE STATE OF THE JUDICIARY 4 (February 6, 2006) ("[G]iven the extensive findings of the Feerick Commission and the extensive findings of the United States District Court, we are not dealing solely with a 'Brooklyn problem,' or a 'New York City problem' * * * The issues that have been identified are pervasive, both systematically and geographically.").

[10] Judge Jonathan Lippman, The Public Policy Forum: Court Reform in New York State (May 17, 2005) ("Our responsibility to the public is to take immediate steps to ensure public trust and confidence and address the problems that we know exist—that * * * a very few political leaders * * * determine who becomes a judge in one party districts * * *."), *available at* http://www.rockinst.org/assets/F6FC4E1B-4290-42D7-BBA3-E5761D783F81.pdf (last visited July 12, 2007).

[11] Br. of Former N.Y. State Judges as *Amici Curiae* in Support of Plaintiffs-Appellants and Supporting Affirmance at 10, López Torres v. N.Y. State Bd. of Elections, 462 F.3d 161 (2nd Cir. 2006) (No. 06-0635-CV) ("New York has fostered and tolerated a system in which voters not only are deprived of their right to choose, but

Political and judicial leaders are not the only ones calling for change. Influential newspapers throughout the state have opposed the judicial election scheme as well. These papers include the New York Times,[12] the Buffalo News,[13] the Syracuse Post-Standard,[14] the Rochester Democrat and Chronicle,[15] the Albany Times Union,[16] the New York Daily

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in which they are left to question whether they have been denied that right in order for others to use objectionable criteria to determine who will become judges.").

[12] See Editorial, *Breaking Down the Clubhouse*, N.Y. TIMES, Sept. 9, 2006, at A14 ("The current system of choosing judges through secret deals and old-fashioned cronyism corrodes the integrity of the legal system and diminishes the courts.").

[13] See Editorial, *Yes, Choose Judges Democratically*, BUFFALO NEWS, Feb. 1, 2006, at A8 ("Push came to shove for the inherently undemocratic way New Yorkers select candidates for State Supreme Court judgeships. A federal judge in Brooklyn ruled last week what reformers and critics knew all along—political party bosses should not pick judges.").

[14] See Editorial, *Justice for Voters*, SYRACUSE POST STANDARD, Nov. 22, 2006, at A10 ("Under the discredited system, party bosses gathered behind closed doors to decide who the judicial candidates would be. [It was] virtually impossible for a candidate not blessed by the party to win the nomination.").

[15] See Editorial, *Court System Broken*, ROCHESTER DEMOCRAT AND CHRONICLE, Jan. 28, 2007 ("The Supreme Court judicial selection process in New York—closed conventions with hand-picked delegates often beholden to party bosses—belongs in the museum of political chicanery, not still churning out favored candidates in the 21st century.").

[16] See Editorial, *Last Word on Judges*, ALBANY TIMES UNION, Feb. 24, 2007, at A8 ("[Party] bosses * * * have the largest say in who is nominated because they have the most influence in choosing the convention delegates who place the names in nomination. The bosses also have the power to strike cross-endorsement deals with the opposing party, thereby denying voters a choice and ensuring the election of a favored candidate.").

News,[17] and New York Newsday.[18] Highly respected political and legal organizations oppose the current system as well, including the Association of the Bar of the City of New York[19]; the Asian American Legal Defense Fund, Puerto Rican Legal Defense Fund, the Amistad Black Bar Association, the Center for Law and Social Justice, Latino Lawyers of Queens, the Puerto Rican Bar Association, and the Rochester

[17] See Editorial, *Death Sentence For Boss Rule*, N.Y. DAILY NEWS, Sept. 5, 2006, at 34 ("The [Second Circuit's] ruling * * * was stunning in the extent to which [the] panel laid bare, fact by fact, how the bosses exploit rigged procedures to deny the voters any say in selecting jurists for the state's primary trial courts.").

[18] See Editorial, *Don't Let Pols Choose Judges*, N.Y. NEWSDAY, Feb. 22, 2007, at A36 ("The current system makes for sham elections.").

[19] See Br. of *Amicus Curiae* the Ass'n of the Bar of the City of N.Y. in Support of Affirmance at 7-8, López Torres v. N.Y. State Bd. of Elections, 462 F.3d 161 (2nd Cir. 2006) (No. 06-0635-CV) ("The judicial district nominating conventions * * * accomplish no proper purpose. Under the present system, delegates to the judicial convention generally do as they are told by the political leaders who select them, and therefore play no constructive role in the judicial selection process.")

Black Bar Association[20]; the Fund for Modern Courts[21]; and the Citizens Union.[22]

Yet despite this overwhelming opposition, the convention system remains unchanged. The current system is deeply entrenched precisely because of the great power it gives to local party leaders. Senator Martin Connor's testimony in the district court shows why the current system is so difficult to change. Even though Senator Connor felt that a judicial candidate being nominated at a convention was grossly unqualified, he was afraid and unable to speak up because of the political costs of opposing the local party official who supported the nominee. Local party officials will not give up their power over judicial selection without a fight, and politicians are loath to pick fights they are unlikely to win. Elected officials feel unable to challenge the local party officials on whom they must rely for support, and it is for this reason that the state legislature has shown little inclination to change the election law over the decades, despite almost universal sentiment that the system is flawed.

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[20] Br. of *Amici Curiae* for Affirmance the Asian American Legal Defense and Educ. Fund et al. at 1, López Torres v. N.Y. State Bd. of Elections, 462 F.3d 161 (2nd Cir. 2006) (No. 06-0635-CV) ("Minorities seeking to become supreme court justices in this state are not served by a closed, back-door system built on cronyism and political favors.").

[21] Br. of *Amicus Curiae* Fund for Modern Courts in Support of Affirmance at 2, López Torres v. N.Y. State Bd. of Elections, 462 F.3d 161 (2nd Cir. 2006) (No. 06-0635-CV) ("The selection of Supreme Court justices in New York is, by and large, a process controlled not by the voters but by political leaders, largely unaccountable to the citizens of New York.").

[22] Br. for *Amicus Curiae* Citizens Union of the City of N.Y. at 3-4 ("[T]he unique structure of New York's convention system, as it has operated for decades, results in political party leaders hand picking New York's Supreme Court justices, while New York's voters are denied any significant role in the process.").

That is, until the district court's ruling and Second Circuit's affirmance. Until this Court granted certiorari, state legislators were finally moving forward toward meaningful reform. One court order had the potential to fix a broken political process and finally end the party bosses' long death-grip on the state judiciary. The Supreme Court can make, and has made, contributions to democracy by refusing to uphold laws that impose structural impediments frustrating voters' ability to make changes through purely political means. *Reynolds* v. *Sims*, 377 U.S. 533 (1964), perhaps this Court's most famous foray into state election practices, has received praise for overturning entrenched state systems that had proven insusceptible to normal political attack despite opposition by the majority of voters in many states. See, *e.g.*, Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 45-46 (2004); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 541 (1997). More recently, the Court in *Randall* v. *Sorrell*, 126 S. Ct. 2479 (2006), was motivated in part by concerns over incumbent entrenchment when it struck down Vermont's limits on campaign donations. An affirmance in this case would be consistent with this Court's important tradition of ensuring that electoral systems truly effectuate the choices of the *voters*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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